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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALAN WILLIAMS, Defendant and Appellant.	B209510 (Los Angeles County Super. Ct. No. TA088616)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen Joseph Webster, Jr., Judge. Affirmed with directions.

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Alan Williams, appeals from his convictions for two counts of willful, deliberate and premeditated attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664) and the jurors' gang and firearm use findings. (§ 186.22, subd. (b), 12022.53, subds. (b), (c), (d), and (e)(1).) Defendant argues that the trial court improperly admitted evidence of a suggestive photo identification and his post-arrest statements and he was awarded an inadequate number of presentence custody credits. We increase his presentence credit award but otherwise affirm the judgment.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Defendant dated Coleeco Walker between the time she was in the eighth grade and age 23. Ms. Walker and defendant had a child together. Ms. Walker owned a model 745 BMW automobile, which she occasionally loaned to defendant. Ms. Walker loaned the BMW to the codefendant, Shavon Thomas, on the morning of June 23, 2006. Ms. Thomas had two cars of her own. Later the same day, Ms. Walker was advised that her car had been involved in a traffic accident. Her BMW was damaged when Ms. Walker retrieved it from a tow yard. Ms. Walker saw defendant three or four days after learning her car was in an accident. Thereafter, Ms. Walker saw defendant 10 or 11 times before she went to work. Defendant cared for Ms. Walker's daughter on these occasions.

On July 24, 2006, Maurice Thomas lived on Ward Avenue in Compton. His daughter, Ms. Thomas, the co-defendant, did not live with him. Ms. Thomas came to Mr. Thomas's home at approximately 10:30 a.m. in a black BMW automobile.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Ms. Thomas told her father the BMW driver was the individual she met at the skate park on July 4, 2006. Ms. Thomas also told her father that the driver had purchased the car for $30,000. Ms. Thomas then went into the house, where she grabbed something before leaving in the black BMW. Mr. Thomas was shown a picture of defendant. Mr. Thomas identified defendant as the individual driving the black BMW on July 24, 2006. Mr. Thomas had also seen defendant at the skate park on July 4, 2006.

On July 24, 2006, at approximately 10:45 a.m., Khafra Akbar, Dayon Garrison and Richard Givens were outside a barber shop in Compton waiting to get haircuts when they heard gunshots. Mr. Akbar was shot in the ankle. Mr. Garrison was shot in his chin. Mr. Akbar did not see anyone shooting. After he was shot, Mr. Akbar ducked down. Mr. Akbar denied having told Deputy John Duncan the man firing the shots was a tall, thin, dark-skinned African-American who was approximately six foot three inches to six foot five inches tall wearing blue jeans and a brown hat with a "NY" logo on it. Mr. Akbar denied having identified anyone from two photographic lineups presented by Detective Duncan a week or two after the shooting. Mr. Akbar testified that Detective Duncan pointed to one of the individuals depicted in the photo lineup and said, "This is the suspect who shot you, all you have to do is circle it and everything's going to be all right." Mr. Akbar denied any association with the local gang. Mr. Akbar did not know a rival gang member, Eric Reese, or other individuals would be in the courtroom.

Mr. Givens testified that he was driven to the barber shop on July 24, 2006. Accompanying Mr. Givens were Mr. Garrison and Christopher Ward. Mr. Givens stated that he was in the car when the shots were fired. Everything happened so quickly that Mr. Givens did not pay attention to how many shots were fired. Mr. Akbar and Mr. Garrison were driven by Mr. Givens and Mr. Ward to a nearby hospital. Mr. Givens denied any gang membership or affiliation. Mr. Givens also denied knowing that Mr. Reese was the leader of a rival gang.

A minor was inside his home when he heard four or five shots fired and a car drive off. The youngster was concerned about his brothers, who were outside. The minor ran outside and told his brothers to come in. The minor saw a black BMW automobile drive

rapidly away. The minor was later taken by sheriff deputies to a place where a black BMW had crashed. He was afraid to testify and was shaking on the witness stand.

At approximately 11 a.m., Sandy Davis was driving a General Motors Suburban truck from Artesia onto Alameda. This intersection was a little over a mile from the shooting scene. As Mr. Davis passed through a green traffic signal, he was struck on the driver's side just behind the driver's door by a BMW model 745 travelling at high speed through a red signal. Mr. Davis saw a tall, slim, dark-skinned, African-American man who was wearing a corn row hairstyle get out of the driver's seat. The driver grabbed a small object wrapped in a white paper or cloth from the back seat of the BMW. Another lighter-skinned man and a woman got out of the BMW. The three individuals ran up a hill to a transition road. Mr. Davis suffered a puncture wound to his leg as a result of the accident. Mr. Davis described the three individuals to the responding deputies. Mr. Davis later identified defendant as the driver of the BMW from a six-pack photo display. Mr. Davis identified defendant as the driver at the preliminary hearing and trial.

Deputy Miguel Balderrama responded to the emergency call of a traffic accident made at 10:56 a.m. Deputy Balderrama arrived at the scene at 11:26 a.m. When Deputy Balderrama arrived at the accident scene, the BMW was empty. Mr. Davis, the truck driver, was injured. Ms. Thomas later approached Deputy Balderrama at the accident scene. Ms. Thomas told Deputy Balderrama: "That is my car. I crashed. I was scared. That's why I ran." Deputy Balderrama later learned the BMW was registered to Ms. Walker. Deputy Balderrama arrested Ms. Thomas. Mr. Davis told Deputy Balderrama that Ms. Thomas was the woman who was inside the BMW who ran off toward the Crystal Park Casino. Deputy Balderrama became aware of a nearby shooting involving a black car. Deputy Balderrama notified the deputies at the shooting scene that the BMW had crashed nearby.

Deputy Michael Hernandez arrived at the shooting scene, where he saw shell casings on the ground in a parking lot. Deputy Hernandez spoke to the minor. The minor saw an African-American man wearing a white T-shirt and blue jean shorts. The suspect wore a white bandana on his head and carried a black semiautomatic handgun in

his left hand. According to the minor, the African-American man entered the rear driver's side of a large black sedan with silver and chrome wheels. Deputy Hernandez drove the youngster to the accident location. The minor was advised of field show-up procedures. The minor immediately identified the BMW stating, "Yeah, that was the car that was used in the shooting." Deputy Hernandez recalled that the minor was taken back to the accident scene later.

Deputy David Porter drove the minor to the accident scene and then to the nearby Crystal Park Casino. Other sheriff's cars were parked in the casino parking lot. The minor pointed to a person inside one of the sheriff's cars. The youngster told Deputy Porter that the man involved in the shooting was a tall, thin African-American man like the one in a sheriff's car. At trial, the minor denied having: identified anyone; giving a description of the person who fired the shots; or stating the car involved in the shooting had chrome rims.

A security videotape taken at the Crystal Park Casino at 10:46:56 a.m. on July 24, 2006, was played at trial for the jury. The video depicted two men running past the camera and a woman walking by thereafter. Detective Duncan reviewed the videotape with Alfredo Rodriguez, the casino surveillance manager. Detective Duncan saw a tall, thin African-American male run past the entrance of the casino, followed by another individual and then Ms. Thomas. Detective Duncan then saw Ms. Thomas walk back toward the accident scene. When Detective Duncan saw Ms. Thomas in the back of the police car at the accident scene, she was wearing a white tank top and red shorts, just as she was wearing on the videotape. Sergeant Paul Delhauer later conducted a crime scene reconstruction at the casino. Sergeant Delhauer measured and marked the pillars outside the casino and prepared another video of himself in the same position where the suspects had run, Sergeant Delhauer was able to determine that one of the suspects was approximately six feet, six inches tall.

Deputy Eric Moreno interviewed Mr. Akbar and Mr. Garrison at the hospital following the shooting. Neither victim identified their assailant. Later, Detective Duncan interviewed Mr. Akbar at the hospital. Detective Duncan was unaware that Mr.

Akbar had previously declined to make an identification. Mr. Akbar had been waiting to be picked up at a barbershop by friends. Mr. Akbar heard shots and ducked his head. When Mr. Akbar looked up, he saw a tall, thin African-American man, who was six foot three inches to six foot five inches tall. Mr. Akbar told Deputy Duncan the man ran east on Alondra Boulevard. The tall African-American man wore jeans and a brown hat with the letters "NY" on it. Mr. Akbar knew the hat logo symbolized a rival gang.

Detective Duncan interviewed Ms. Thomas at the jail. Ms. Thomas waived her constitutional rights before answering his questions. Ms. Thomas had traded cars with Ms. Walker. Ms. Thomas was driving Ms. Walker's BMW on the day of the shootings. Ms. Thomas gave her father's address on South Ward Street as her residence. Detective Duncan knew both Ms. Thomas and defendant, having had numerous contacts with them and other gang members when he worked with gangs in the area. Detective Duncan told Ms. Thomas that her father said she had been to his home before the shooting. Also, Ms. Thomas was advised her father said she was with an African-American man driving a BMW. Detective Duncan described Ms. Thomas' response to his revelations, "She became very distraught, started crying, wanted to talk to her mother."

Detective Duncan went to the tow yard where Ms. Walker's damaged BMW had been taken. While searching the BMW, Detective Duncan found a reappear notice and misdemeanor complaint in defendant's name. Detective Duncan also found a white T-shirt, latex gloves, and digital and video cameras. The six shell casings and two bullets found at the scene of the shooting were consistent with having been fired from a .40 caliber Glock semiautomatic handgun.

A court ordered wiretap surveillance had been in place to monitor the activities of defendant's gang in July 2006. Neither Mr. Williams nor Ms. Thomas was a target of that wiretap. However, the calls intercepted are numbered in a database. The database can then be searched for specific phone numbers and names mentioned. The database was searched for the name "Shavon" and defendant's gang moniker. In a conversation recorded on June 11, 2006, defendant asked Ms. Thomas, "Did you come up last night?" Ms. Thomas responded, "A couple of dollars and a gun." Defendant asked Ms. Thomas,

"Why didn't you sell me the heat?" Ms. Thomas refused, stating she would keep it, but added: "You could use it one day, if you need to. But, not having it." When defendant asked what kind of gun she had, Ms. Thomas said, "Forty Glock."

In another conversation recorded on May 24, 2006, Ms. Thomas referred to Detective Duncan as "Duncan." Ms. Thomas also said, "I ain't seen him since he stopped the homies in my car." Detective Duncan had stopped Alan Feagin, a rival gang member, when he was driving Ms. Thomas's Dodge Stratus automobile. On that occasion, Ms. Thomas appeared on the scene and reclaimed her car. A recording of that conversation was played at trial. During the conversation, Ms. Thomas appeared to be speaking about gang activities and related problems.

Deputy Duncan secured a warrant for defendant's arrest. Detective Duncan contacted defendant's parole officer. Deputy Duncan also went to the homes of defendant's grandmother and Ms. Walker. On August 13, 2006, Deputy Roberto Medrano, accompanied by a partner, saw a car stalled in the middle of the street. The car then went into a driveway. As the deputies drove behind the car, defendant got out of the front passenger seat, made eye contact with Deputy Medrano, and ran. The deputies got back into their patrol car. After making a U-turn, the deputies drove in the direction defendant had run. Defendant turned to look at them as he crossed the street and ran through some houses. Defendant was carrying a black object in his right hand. The deputies ordered defendant to stop. However, defendant continued running through the nearby houses. Deputy Medrano radioed for assistance. A perimeter was set up with other deputies.

Once the deputies began searching the area, a call was received from Mercedes Martin. Ms. Martin reported that an African-American man broke into her home and attempted to hide. The man ran through an open front door at Ms. Martin's home. Ms. Martin's husband pushed the man out. The man ran outside and towards the back of the house. Defendant was detained and placed in Deputy Medrano's patrol car.

Defendant spoke to Deputy Medrano. Defendant said he ran because he had an outstanding warrant. Defendant said: "Man, I'm sorry, deputy, I was scared. I ran

because I knew I had a warrant. I just wanted to see my daughter before I turned myself in tomorrow and I know I'm on parole." Sherriff's deputies transported defendant to be booked. Defendant began threatening the deputies. Defendant said the deputies were corrupt. Defendant said his sister was a professional basketball player and that nothing was going to happen to him. Defendant also claimed to have a great lawyer. Moreover, defendant said the deputies would be sorry they arrested him. Defendant stated he was going to get rich off his arrest or lawsuit. Defendant said there would be retaliation for a shooting which occurred in Compton where deputies killed someone. Defendant said the deputies would "get yours." When asked if he was threatening the deputies, defendant said, "Take it like you want it."

Detective Duncan was assigned to the violent gang force and had extensive experience and training as a gang investigator. Detective Duncan was most familiar with defendant's gang. In the course of investigating the shooting and subsequent automobile accident in this case, Detective Duncan served search warrants on the homes of: defendant; Ms. Thomas; Mr. Thomas; and Ms. Walker. Detective Duncan recovered photographs from defendant's home depicting defendant and other members of the rival gang making a gang sign. Also found at defendant's home were items bearing various forms of rival gang graffiti. Other photos depicted defendant wearing a New York Yankees baseball cap. Rival gang members wore Yankees hats.

The primary activities of the rival gang were: murders; assaults with deadly weapons; burglaries; robberies; rapes; pimping; grand thefts; and carjacking. Defendant had personally admitted being a gang member to Detective Duncan. Detective Duncan believed defendant was a member of the rival gang. This conclusion was premised upon defendant's associations with other gang members, his admissions, and the wiretap investigations. When posed with a hypothetical scenario similar to the facts of this case involving a shooting and subsequent automobile collision, Detective Duncan believed the crimes were committed for the benefit of the rival gang. Such activities would enhance the gang's reputation and status in the community.

III. DISCUSSION

A. Evidentiary issues

1. Photographic lineup

a. Factual and procedural background

Defendant argues that he was "denied due process" because of an impermissibly suggestive identification procedure. Defendant further argues that the photographic lineup was impermissibly suggestive because his photograph appeared darker than the other five individuals depicted in the array. Defendant did not object to the introduction of the photographic lineup at trial. Following return of the verdicts, represented by a new attorney, defendant filed a new trial motion, which maintained as one of its grounds that the photographic lineup was impermissibly suggestive. In response to defense counsel's argument at the new trial motion hearing, the trial court noted: "All of these individuals are African Americans. Hairstyle or no hairstyle. They could all be bald headed. Every man in this - - all six of these photographs, these are Black men. Now some are lighter than others. But there is nobody in here who could be mistaken or misconstrued for anything other than African American. Nobody. [¶] So that I will concede and I will basically agree that obviously Mr. Williams is a darker complexion than the other five. But every man on here is African American and most of their hairstyles are similar. Some are lighter than others. But they're all - - really only one I would consider light-skinned. The rest of them are brown-skinned, medium brown-skinned or dark brown skinned. But nobody here is anything other than a African American." In denying the new trial motion, the trial court ruled that in addition to the six-pack photographic display, there were other factors to consider as to why the lineup was not unduly suggestive, including: the witnesses' similar descriptions of the assailant's height and complexion of the person who fired the shots; the clothing worn by the person who fired

the shots; Mr. Akbar's personal familiarity with the assailant; and the description given to the police was consistent with the description of the individual who ran from the accident and thereafter through the casino.

b. Forefeiture

Defendant's failure to object to the photographic lineup evidence at trial forfeits the issue on appeal. The California Supreme Court has held: "'"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]"' [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 620, quoting *People v. Seijas* (2005) 36 Cal.4th 291, 301; see *People v. Partida* (2005) 37 Cal.4th 428, 434-435; see also Evid. Code, § 353.) Although defendant did bring a new trial motion based in part on this contention, the issue was not raised before it could be remedied at trial. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation claim]; *People v. Turner* (1994) 8 Cal.4th 137, 177 [search and seizure claim].)

c. The trial court could reasonably deny the new trial motion as it relates to the challenged photographic display

"We independently review 'a trial court's ruling that a pretrial identification procedure was not unduly suggestive.'" (*People v. Avila* (2009) 46 Cal.4th 680, 698-699, quoting *People v. Kennedy* (2005) 36 Cal.4th 595, 609.) As to the new trial motion, we review the trial court's ruling for abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 999, fn. 4; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252.) As set forth above, the trial court ruled the photographic lineup was not unduly suggestive when coupled with other factors related to the witnesses' identification. We agree.

Our Supreme Court has held, "Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if

so, the resulting identification was also unreliable. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114; *Neil v. Biggers* (1972) 409 U.S. 188, 196-199; *People v. Cunningham* (2001) 25 Cal.4th 926, 989.)" (*People v. Yeoman* (2003) 31 Cal.4th 93, 123; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Moreover the burden of proof rests with defendant to demonstrate the existence of an unreliable identification procedure. (*People v. Avila, supra,* 46 Cal.4th at p.700; *People v. Carter* (2005) 36 Cal.4th 1114, 1164; *People v. Cunningham, supra,* 25 Cal.4th at pp. 989-990; *People v. Ochoa, supra,* 19 Cal.4th at p. 412.) In *Cunningham* our Supreme Court held: "[T]here must be a 'substantial likelihood or irreparable misidentification' under the ""'totality of the circumstances'"' to warrant reversal of a conviction on this ground." (*People v. Cunningham, supra,* 25 Cal.4th at p. 990, quoting *Manson v. Braithwaite, supra,* 432 U.S. at pp. 104-107.)

There is no substantial likelihood that Mr. Akbar and Mr. Davis misidentified defendant when they viewed the photographic lineup. Mr. Davis saw defendant get out of the automobile following the accident and run up the hill to the casino. Mr. Davis described defendant in detail to the deputies. Mr. Davis also identified defendant at the preliminary hearing and trial. Defense counsel acknowledged that defendant was depicted "running across the video [at the casino] and it's nice and neat, clear as a bell" on the videotape. Defense counsel also acknowledged that defendant was driving the car at the time of the accident. Further, defense counsel acknowledged paperwork involving defendant's misdemeanor sentencing was found inside the damaged BMW. Mr. Akbar also described the person who fired the shots in detail to sheriff's deputies. The description included the assailant's height, clothing and baseball cap with the New York logo. Mr. Akbar's subsequent viewing of the photographic lineup resulted in a statement to Detective Duncan that the individual in position No. 4 "looks like the guy" who fired the shots. However, Mr. Akbar refused to circle or sign the photo display. Mr. Akbar knew defendant as a rival gang member.

We have reviewed the photographic lineup in this case. As the trial court observed, it cannot be said as a matter of law that the lineup is unduly suggestive: all of

the men in the photographic lineup are of African-American descent; all have similar hairstyles; and all have facial hair. Arguably defendant's photo in the No. 4 placement appears darker than some of the other men. But the individual in the No. 5 placement could be said to stand out because he is lighter than all the others. The photographic lineup does not reveal any suggestion of the identity of the person suspected by the deputies. (*People v. Avila, supra,* 46 Cal.4th at p. 699; *People v. Ochoa, supra,* 19 Cal.4th at p. 413.) Our independent review of the trial court's ruling that the identification procedure was not unduly suggestive comes to the same conclusion. This finding disposes of defendant's due process claim as well. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 125; *People v. Johnson* (1992) 3 Cal.4th 1183, 1216.) Moreover to the extent defendant implies the trial court erred by denying his new trial motion, we disagree as there has been no apparent manifest and unmistakable abuse of discretion. (*People v. Hovarter, supra,* 44 Cal.4th 983, 999, fn. 4; *People v. Musselwhite, supra,* 17 Cal.4th at p. 1252.)

d. Harmless error

In any event, even if the photographic identification evidence was improperly admitted, the error was harmless under any prejudice based standard of reversible error. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Mr. Thomas, who lived very close to the shooting location, told the investigator that his daughter, Ms. Thomas, had been to his home in a black BMW just prior to the shootings. Ms. Thomas was accompanied by defendant. Ms. Thomas retrieved an object from the house. The wiretapped conversation between Ms. Thomas and defendant on June 11, 2006 revealed she had a .40 caliber Glock handgun and she would allow him to later use the firearm. The weapon used in the shootings in this case was a .40 caliber and was consistent with a Glock model handgun. The minor identified the BMW used in the shootings as the same as the one involved in the accident shortly thereafter. Ms. Thomas and defendant were seen running toward a nearby casino immediately after the accident.

Security videotapes placed defendant at the casino at that time. Ms. Thomas returned to the BMW and claimed it was her car and she was driving when the accident occurred. Mr. Davis, Mr. Akbar and the minor all identified the driver as a tall, thin, African-American man. Defendant stands six feet, four inches tall and fits that description. Based upon this overwhelming evidence of defendant's guilt, any error in admitting the photographic lineup was harmless.

2. Defendant's statements to booking deputies

a. factual and procedural background

Defendant argues that the trial court improperly admitted evidence of his statements to the deputies present at the time he was booked into custody. Defendant further argues his statements should have been excluded pursuant to Evidence Code sections 352[2] and 1101, subdivision (a).[3] As set forth previously, defendant told the booking deputies his sister was a professional basketball player and nothing was going to happen to him. Defendant also claimed to have a great lawyer and the deputies would be sorry for making the arrest. Defendant told the deputies that he was going to get rich off his arrest or lawsuit. Defendant also said there would be retaliation for a shooting in Compton during which deputies killed someone. When asked if he was threatening the deputies, defendant responded, "Take it like you want it."

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[2] Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[3] Evidence Code section 1101, subdivision (a) states, "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

At the time the prosecutor began questioning about the statements, defendant's attorney, objected to the evidence as irrelevant. The prosecutor indicated the statements constituted an admission. During a sidebar conference, defense counsel again objected on relevance grounds. No objection was interposed as to defendant's parole status because that would come into evidence when he took the stand. Counsel for Ms. Thomas, objected on Evidence Code section 352 grounds. The trial court overruled their objections. The trial court instructed the jury regarding defendant's statements with CALCRIM No. 358.[4]

b. forfeiture

As set forth above, defendant's attorney objected only on relevance grounds to the statements in question. Ms. Thomas's attorney added an Evidence Code section 352 objection. However, neither attorney's objections were premised on Evidence Code section 1101, subdivision (a) grounds as defendant does here. Defense counsel's attempt to add further grounds for his objection on appeal is untimely and the Evidence Code section 1101, subdivision (a) issue has been forfeited. (Evid. Code § 353; *People v. Demetrulias* (2006) 39 Cal.4th 1, 22; *People v. Gurule* (2002) 28 Cal.4th 557, 626.) In addition, defendant's constitutional contention was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, and procedural default. (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Panah* (2005) 35 Cal.4th 395, 436; *People v. Williams* (1997) 16 Cal.4th 153, 250.)

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[4] CALCRIM No. 358 was given as follows: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give such statements. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Moreover, defendant's further claim that defense counsel was ineffective for failing to more specifically object is meritless. Our Supreme Court has held: '"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Avena* (1996) 12 Cal.4th 694, 721.)' (*People v. Williams*[*, supra,*] 16 Cal.4th [at p.] 215.) [¶] . . . ' . . . "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349.)' (*People v. Williams, supra,* 16 Cal.4th at p. 215.)" (*People v. Majors* (1998) 18 Cal.4th 385, 403.) Our Supreme Court has also held: "Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Gray* (2005) 37 Cal.4th 168, 207; *People v. Anderson* (2001) 25 Cal.4th 543, 569.) Counsel need not pursue futile or meritless objections or argument. (*People v. Prieto* (2003) 30 Cal.4th 226, 261; *People v. Ochoa, supra,* 19 Cal.4th at p. 432; *People v. Lewis* (1990) 50 Cal.3d 262, 289.) Nothing in the record demonstrates why defense counsel failed to cite Evidence Code section 1101, subdivision (a) or there was any possibility such an objection would have been sustained.

c. The trial court could properly admit defendant's statements

We review a trial court's ruling on the admissibility of evidence questions for an abuse of discretion. (*People v. Hoyos* (2007) 41 Cal.4th 872, 898; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113, overruled in part in *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Cox* (2003) 30 Cal.4th 916, 955, overruled in part in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Smithey* (1999) 20 Cal.4th 936, 973.) A trial court's ruling will not be disturbed unless it exercised discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra, supra,* 37 Cal.4th at p. 1113; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Evidence is relevant if it has "any tendency in reason to prove or disprove" any disputed fact of consequence. (Evid. Code, § 210; *People v. Carter, supra,* 36 Cal.4th at p. 1166; *People v. Garceau* (1993) 6 Cal.4th 140, 177.)

Here, the trial court could reasonably find defendant's statements made at the time of his arrest and booking were: relevant to his state of mind at the time; were misleading; and they constituted a threat directed at the deputies. Indeed, the trial court indicated: "He said he didn't do it and then basically he just pretty much erroneously - - and he is going to sue him. Seems to me it suggests he didn't do it. It seems to me it is relevant on at least the issue that he didn't do it." Evidence Code section 1220 states, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." (See *People v. Hovarter, supra,* 44 Cal.4th at pp. 1006-1009 [defendant's statement to his rape victim that it was not the first time he had done this and he knew what he was doing was properly admitted by the trial court as an admission]; *People v. Guerra, supra,* 37 Cal.4th 1122-1123 ["statement [to the bailiff] made by and offered against defendant, the declarant as well as a party to [the] prosecution" admissible]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1167-1168 [defendant's false statement to arresting officers may be introduced to show it was willfully false or deliberately misleading].)

Here, defendant denied any criminal involvement, despite the evidence: he was in the car with Ms. Thomas before the shooting and at the time of the accident; just minutes after the shooting, he ran from the scene of the accident; and he fit the description of the person who fired shots. Defendant's intentional statements to the booking officers constituted misleading statements by a party declarant. The statements were admissible as admissions of either defendant's guilt or innocence. The trial court was within its discretion in finding the statements relevant. The trial court determination of admissibility was not arbitrary, capricious, or patently absurd nor has it resulted in a manifest miscarriage of justice. (*People v. Hovarter, supra,* 44 Cal.4th at p. 1009; *People v. Guerra, supra,* 37 Cal.4th at p. 1113.)

Moreover, the admission of defendant's statements did not violate the provisions of Evidence Code sections 352 and 1101, subdivision (a). The California Supreme Court has held, "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Carter, supra,* 36 Cal.4th at p. 1194; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) The undue prejudice related to the admission of evidence must substantially outweigh its relevance to constitute error. (Evid. Code, §352; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Defendant argues that the admission of his statements to the deputies had no probative value. Defendant further argues: "The improperly prejudicial evidence of [his] obnoxious and belligerent statements, and his arguable threat to the booking officers, impugned [his] character and showed that [he] is a person of poor character, who has no respect for authority or the police in particular, and who believes that he is above the law." Defendant concludes that the prejudice he suffered as a result of the admission of his statements outweighed their "non-existent" probative value. We disagree.

As set forth above, the trial court, without abusing its discretion could conclude: defendant's self-serving potentially misleading statements were probative of his state of mind at the time of his arrest; the introduction of the statements did not necessitate an undue consumption of time, confuse the issues, or mislead the jury; and any resulting

prejudice did not substantially outweigh their probative value. Without abusing its discretion, the trial court reasonably could have ruled the introduction of defendant's statements was likewise not violative of Evidence Code section 1101, subdivision (a). The trial court could reasonably rule nothing about the statements served to prove defendant's character or conduct on a specific occasion. Rather, the statements were falsehoods and calculated threats made in an effort to forestall prosecution.

In any event, any error in admitting evidence of defendant's statements was harmless in light of the other evidence supporting the verdict. (*People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Earp* (1999) 20 Cal.4th 826, 878.) In addition, we find the evidence was not so prejudicial so as to render defendant's trial fundamentally unfair. (See *People v. Partida, supra*, 37 Cal.4th 428, at p. 439 ["the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-231.)

B. Presentence Credits

The Attorney General concedes that defendant was entitled to additional presentence credits. The trial court awarded defendant 672 days of actual custody and 101 days of conduct credit. Defendant was arrested on August 13, 2006. Defendant was sentenced on June 26, 2008. As a result, defendant was entitled to 684 days of actual custody credit and 102 days of conduct credit for a total of 786 days. The failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) The trial court is to personally insure the abstract of judgment is corrected to full comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgment is modified to reflect the award of presentence credits of 786 days which includes 101 days of conduct credits. Upon remittitur issuance, the superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.